

# THE CONTRADICTIONS OF THE JUSTICE. THE METAPHYSICAL PRINCIPLES OF LAW

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## Abstract

*This essay represents an attempt to highlight, from a philosophical perspective, the most significant contradictions that can affect the justice throughout a period of social crisis. The object of our analysis consists of the contradictions between: the law and justice; the justice and society and the act to fulfill the justice and what we have just called “the fall in exteriority” of justice. Within this context we refer to some aspects that characterize the person and personality of the judge. This essay is a pleading to refer to the principles, in the work for the law’s creation and applying. Starting with the difference between “given” and ‘constructed” we propose the distinction between the “metaphysical principles” outside the law, which by their contents have philosophical significances, and the “constructed principles” elaborated inside the law. We emphasize the obligation of the law maker, but also of the expert to refer to the principles in the work of legislation, interpretation and applying of the law. Arguments are brought for the updating, in certain limits, the justice – naturalistic concepts in the law.*

**Keywords:** *normative order, law and justice, the contradictions of the justice, the fall in exteriority, metaphysical principles and constructed principles*

## 1. Introduction

Justice should be a harmonious system in order to be in its truth and reality. “The truth is real only as a system”<sup>1</sup> said Hegel and by confirming this statement, justice is in its truth only if it satisfies this condition. The system means coherent order, functionality, suitability to the real and its purpose, but mainly unity in its diversion, a concrete universal in which each part to express the whole and this one to legitimize through the created order, the component parts. The system, including the justice one manifests itself dialectically, transforms itself, become a historical being, without losing the harmony and coherence. The thinker of Jena pointed out that “Truth is the whole. The whole is only the essence that fully accomplishes itself through its development”<sup>2</sup>. Like any other system, justice has its components or subsystems: ideal, value, normative, jurisprudential subsystem (the act of justice), institutional and perhaps the most important component, man as a producer, but also as a beneficiary of the act of justice. The truth of the judiciary system involves the making in its wholeness but also by each component of own existential purpose, which is at the same time its being, namely the *righteousness* as a values ideal but transposed into reality’s concrete.

To the extent that the functions, we may say, the mission of justice, fulfill and express at the same time the functional harmony of a system, which at any time attempts the adequacy to its purpose as a value, the fulfilling of justice, justice finds itself in its truth, otherwise said, it gives its own legitimacy without waiting for it to be given, in forms sometimes inadequate, from outside.

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<sup>1</sup> Georg Wilhelm Friedrich Hegel, *Fenomenologia spiritului*, “Phenomenology of the Spirit”, Bucharest: Academy Publishing House, 1965, p.18.

<sup>2</sup>Georg Wilhelm Friedrich Hegel, *quoted works*. p.18.

The contradictions and in general any malfunction in the coherence of the system or inadequacy to the purpose are maladies, deficiencies of the justice, that departs it from its role and truth. When the maladies of the justice become chronic but with manifestations which lead towards aggravation, one may speak about a crisis of the system of justice. Our justice is obviously in such a chronic crisis with tendencies towards aggravation. The main cause is the ailing contradictions of the system. In contrast to the beneficial contradictions that give the becoming, the unhealthy ones tend to depart more and more the justice from its reality and truth.

## 2. Paper Content

In the followings we try to emphasize the sickly contradictions of the justice system specific to the crisis in which this is located:

1. The fundamental contradiction of the justice, expression of the profound crisis in which this is between law and justice, and on the other side the constructive order of the norms and jurisprudence. The *law*, the justice do not represent the purposes and truth of justice, substituting these values, the law, norms and jurisprudence, that will find legitimacy in itself, in the abstract forms, the ephemeral realities, interests and precarious purposes but not in the ideal and reality of justice. Of course even when a judicial system is harmonious functional and does not have this malady, there isn't always a formal overlapping between law and justice. In the healthy justice system, between the justice and law there is a unilateral contradiction in the meaning that the law may contradict the justice, but this one does not contradict the law. The crisis of the judiciary system expresses sometimes in aggravated forms the inadequacy in absolute terms between the justice and law.

The above mentioned contradiction unleashed the "will of power" of the governors to impose their own order and legitimacy to justice by norming and legislating in the meaningless and illusory attempt to create an "order of the norms" that will replace the being and truth of justice: *the righteousness*. Reality shows that this false order proves itself inconsistent, contradictory and mostly inadequate to the realities it is destined for. The mere accumulation of rules, laws even codified, does not lead to the settlement into their being and purpose of the man, the "social" and justice if the norms do not express as a phenomenon the essence: the superior order of the values of justice, equity, truth, proportionality, tolerance. Jurisprudence is manifested the same in the exclusive concern to correspond to itself or to the norms, to be sufficient in itself and not be related to the higher order of the values named above. The act of justice accomplished by the magistrate obstinately seeks for exclusive legitimation only by the rules of law and not through the value order that should be its own.

This ailing contradiction is confirmed, but not made aware by the judicial technique and formalism. A judgement is not pronounced in the name of the justice but in the "name of the law". That is in the name of an order constructed by a temporary political will for the fulfilling of some temporary interests steeped into their particularity and often contrary to the common good and not, as it should naturally be done, in the name of the order *given* and not *constructed* of the values outside the justice but which represent its truth and purpose.

2. The doctrine asserts that the judge pronouncing a decision "is saying the law". It would be good to be so. In fact, most of times, the magistrate by the judgment pronounced "is saying the law" – when he is not doing it – trying to include his sentence in the order of law, which is not necessarily the order of justice, the judge if having the conscience of achieving an act of justice, respecting his moral and professional statute, does not contradict the law, yet there are situations when he should and could do so in the name of a superior order formed out of the values subsumed to the justice concept. For such an act, that is not only an act of justice but also an act of righteousness, courage is needed. The magistrate must assume the risk to exceed

the constructed imperfect order of the law in order to legitimate the act of justice achieved in the superior values reality of the metaphysical principles of law. Such an exiting from the normality of the inadequate forms of the concrete reality is risky for the judge, because the order constructed of the law can impose its coercive force. The contemporary justice is dominated by the order of normativity, of forms that are not abstracted from reality but ignores it.

The sickly rupture between the law and justice (the law as expression of the will of the legislator, of the temporary power, the only one seeking such a separation) should be reflected in the legal education plan. For a correct suitability to the crisis of justice emphasized by this contradiction, but also in order to reflect the order of law and not of righteousness, taught to the students, the faculties in speciality shouldn't be called "Law" Faculties but "Faculties of Laws", as it once was.

3. The contradiction between the justice and "world", throughout "world" we understand both the human in his individuality as the society as a whole. It seems it is increasingly present in the actuality of justice and placed in a place of honour the dictum „ *Fiat justitia et pereat mundus.*” It is not a simple dictum but a tragic reality, a disease of the justice consisting in the inauthentic legitimizing of the separation of justice from the world and man. Justice cannot live, triumph, *be* if the world dies. Between justice and the world there is a unilateral contradiction: justice can contradict the world, but the world cannot contradict the justice, because the world is the medium, the element that justifies the manifestations of justice. The righteousness through justice involves the man, both as a performer of the act of justice and as a beneficiary.

In its contemporary manifestations, the justice in crisis is increasingly making the dictum „*Fiat justitia et pereat mundus*”, trying to become a closed system, existing for itself and in some cases, even worse, directed against human, the only beneficiary of the act of justice, denying its own reason for being. The crisis of justice, by this disease, is also found in the meaningless rhetoric of proclamation of the "abstract man" through rights equally abstract with the intention to give teleological form to its manifestations. But the true existential meaning of justice and its finality at the same time is the man considered in his human dignity. The rhetoric specific to the separation between the justice and world in favour of the abstract man, impersonal has obvious manifestations. Before the court, in a judgment, man is no longer in the concrete of his dignity as a person, but he becomes the "named" at most identified through a locus standing equally impersonal.

The existential rupture between the justice and world, further more the attempt of justice to deny its own medium that justifies its own reason to be, cannot confirm the natural dialectical order that should characterize a good placing of justice in its truth, but may have at the end of the road the nothingness, justice as an empty form, void of the fullness which only the "just" is offering when existing in relation to human's dignity.

4. The contradiction between the justice understood and even in the acceptance of the normative order of law, and on the other side, the act of justice and the magistrate performing it. In philosophy one speaks about an autonomous world of the values existing *per se* and for itself independent even to man. As stated, justice is undeniable a reality and a normative institutional system but also a system of values. Unlike other systems of moral, religious values and in general cultural ones, the essence of justice consists also in its achieving and fulfilling through the act of justice of the magistrate without which the justice system does not close. One can speak at most about the autonomy of the right understood as an order of values, but not about the autonomy of justice outside the act by which it gets concretized. Unlike other systems of values or by other nature, justice is a clear example of a universal concrete fulfilled through the act of justice whose expression is firstly the decision of the judge.

Therefore the act of justice may confirm or refute the normative order of justice and equally as much the right as a system of values. It is a situation similar with the relation between the experiment and the scientific theory “the first being able to confirm or refute the theory, according to the case. Only that in the sphere of scientific theories an experiment may invalidate a theory legitimizing a new, superior order, that will include the old one such as it once happened with Einstein’s relativity theory. In contrast, the act of justice, if contrary to the normative order or the value order of law is only but a mere judiciary error, willfully, unintentionally or accidental of the magistrate which denies even the justice itself and implicitly the right abolishing thus the order of juridical and the lawful order having as finality not another order but the disorder, the chaos. How many judicial errors are now known or unknown.

One needs to emphasize the fact that the act of justice cannot dissociate the person of the one performing it from the magistrate. A judgment even anonymized is not anonymous: the act of justice contains in itself the person but also the personality of the magistrate. We can say that not only the magistrate is the author of the act of justice, but also the act of justice “makes” the magistrate. When the judiciary errors become obvious – the cause being the abandonment by the magistrate of the moral, social, professional statute, he being at peace with the disorder that is specific to the existential non-values – it is customary to say that these are isolated cases that do not characterize the justice system and lawful order. This is not true. Justice as a system of values needs to be confirmed in its own being, coming to truth by each act of justice, by each court judgment. A single judiciary error, a single corrupted or immoral magistrate “denies it by sending the judiciary and lawful order into nothingness, into non-existence. The contemporary reality still provides too many examples for such situations so that you wonder if there’s anything left into the value being of justice. Here is an acute manifestation and not only a chronical one of crisis of justice.

Justice located into its being and truth imposes the magistrate, as a fact of conscience, the object of judgment: the deeds of the man and not the man, meaning the phenomenal that is specific to the humanity of man. Being aware at the principles of law and implicitly the justice as a value specific to an order higher than the normative one, the judge, by fulfilling the act of justice, must although to teleologically relate to the concrete man even if he will rule only over the deeds (actions and omissions) thereof. Unlike this, in case of a sickly justice, the judge imagines that he has the power to judge the man.

5. The falling in exteriority. Of course the justice made by man and for man is profane, to the “measures of man”, but the sacred values are part of his being.

Being a component of the human temporary reality, the justice understood in its value dimension involves the relationship between transcendent and transcendental to which Kant and Heidegger referred to. As a reality of man and society, justice should not be transcendent, meaning “beyond” the man and the world and neither beyond his own reason for being. If this happens we are in the presence of a sickly manifestation specific to the crisis of justice, firstly by its separation from the “world” as mentioned above. Justice must be and remain in its *transcendental* being respectively “on this side” of the existential precariousnesses of this world and outside the conflicts and political interests of all kinds, without implications in the struggle for power or power games. The transcendental of justice is this one’s being in its values dimension, is the right as justice manifested phenomenally through the act of justice.

The contemporary crisis of justice means falling from the immutability of the own existential and values transcendental into the social and political exteriority with the consequence of diminishing or even losing the very being of the “right as value”. Unfortunately the examples are too numerous: conflicts and contradictions inside the institutional system of justice; transformation of justice into a tool for the political actors or of another kind; involving into the struggle for temporary power or into the power games both of

the whole justice system and of the magistrates; shifting from the publicizing of the acts of justice, to the media justice, done by the prime mass media; magistrates' abandonment of the moral and professional statute for the illusory gain conferred by the involvement into the precariousnesses, sometimes miseries of the world; arrogant and aggressive rhetoric without substance by random using, and mainly for the satisfaction of some selfish interests many times immoral, in the sacred name of justice and law: "in the name of law", "in the name of the right" which become simple formulas for legitimizing of what is lacking legitimacy. The falling into exteriority is a painful manifestation of the crisis of justice which is sensed not so much by the judiciary system itself but mainly by the system's beneficiaries: the man, people and society.

We discussed about the crisis of justice. There is a justice of the crisis consisting in the illusion of the system to exist through the sickly contradictions presented above in a world which is not in the realization of the "progress in the conscience of liberty" such as Hegel believed, but mainly in a process of abolition, abandonment of the values cultural being and its replacing through civilization elements, excessive technicization, in a single word through the domination of the forms of civilization over the culture and not vice versa like normal. In social and political plan the world's *dissolution* process is manifested through *mass democracy* and the *democratic individualism* with the consequence of ignoring the man as person and personality, man becoming an individual in a political and economical normative, social order in which he does not confirm his *self* as he has become a mere number taken over by the rhetoric of forms and void ideals.

The crisis of justice cannot have a being as it is outside truth and its purpose like the society of crisis to which is trying to adapt itself. There can be no proper relation between the justice that is in serious sickly contradictions and a society that is in crisis with the purpose to legitimize the existence of a justice of crisis. The justice of crisis can however be a reality but devoid of truth, of being, because not all that exists it really *is*.

It is spoken, somehow with bewilderment about the loneliness and intransigence of the judge. The judge, the magistrate in general, cannot be lonely, he cannot isolate himself, cannot alienate himself. But he can be *a secluded one*. Living in community he must be in communion with the others and at the same time he can take in his being and mainly in his conscience as much of the feelings, values, aspirations of others, of course if all these bear the mark of the being, they are beneficial and not ailing. The common good, but only as a Christian value, must become the own good. The seclusion, the withdrawal in oneself does not imply abandoning the social environment on the contrary it implies its regaining and evaluation by one's own self: "is something deeper in us than ourselves" said Happy Augustin. Only by seclusion in own self, the judge may understand man, he can assimilate him, he may understand a few about the world's self. Seclusion but not loneliness: to be with you in deeper own self, but in communion with yours' another one.

The judge must relate to the concrete man, not to the abstract one, the latter as Goethe understood the sum of all people. He must bring closer to his being Eminescu's words "in every man a world starts its existence", discovering and understanding this world in every man that comes before the judgment seat. In his solitude the joy of the judge must be that to which Kant is referring to: "two things fill the soul with ever newer and growing admiration and veneration: the starry sky above me and the moral law inside me".

Of course, the judge is looking down the ground or (at the earth), such as Aristotel's hand is pointing to in Rafael's painting. Only thus can he take the real, the concrete, the existing, so that together with Plato, to rise up to the idea. The judge is looking down the earth naturally in order to feel, to know not only the rational in the real, but also the real as a rational and to be aware of piety's meanings. "Taller is the man kneeling than standing" – pointed out father Arsenie Boca.

Intransigence can not be in the nature of a judge's being, because it implies the impersonal authority, manifested in the name of the law and justice, but in fact without man and without justice. Intransigence means being placed in the exclusive plan of the formal logic with its categoric distinction between the true and false, between "yes" and "no". Yet, how many senses, how much richness of meanings life is offering between these extreme values to which judicial needs be identified.

Not the intransigence, but piety, mercy should characterize the judge because only thus can he see and understand something of every person's humanity. Noica said: "one needs to have mercy for the insignificant ones to see their meaningfulness"<sup>3</sup>. The piety of the judge is the piety of justice. How well the being and meaning of justice was described on 1919 by the great legal expert Matei Cantacuzino, and how far we depart today from the truth of justice to immerse ourselves into the unauthentic of the "other justice", of the crisis: "In a small church in Rome I saw the painting with a woman holding the black earth into her hands. She warmly embraced it; her expression showed she was a mother, with her eyes turned up to the sky she seemed she was trying to pull the light out of the sky's blue. I was expecting to have written underneath: Charity or Justice or Philanthropy. It was not. It was *Justice!* A justice unblindfolded and understanding all pains, and not the other justice, blind with the sword in one hand and holding a scale with the other hand, so little, that it couldn't contain any of our miseries.

### 3. Conclusions

An argument for which the philosophy of law needs to be a reality present not only in the theoretical sphere but also in the practical activity for normative acts drafting or justice accomplishing, is represented by the existence of the general principles and branches of law, some of them being consecrated also in the Constitution.

The principles of law, by their nature, generality and profoundness, are themes for reflection firstly for law's philosophy, only after their construction in the sphere of law metaphysics, these principles can be transposed to the general theory of law, can be consecrated normatively and applied to jurisprudence. In addition, there is a dialectical circle because the "understandings" of the principles of law, after the normative consecration and the jurisprudential drafting, are subject to be elucidated also in the sphere of the philosophy of law. Such a finding however imposes the distinction between what we may call: *constructed principles of law* and on the other side *the metaphysical principles of law*. The distinction which we propose has as philosophical grounds the above shown difference between "constructed" and "given" in the law.

The constructed principles of law are, by their nature, juridical rules of maximum generality, elaborated by the juridical doctrine by the law maker, in all situations consecrated explicitly by the norms of law. These principles can establish the internal structure of a group of juridical relationships, of a branch or even of the unitary system of law. The following features can be identified: 1) are being elaborated inside law, being as a rule, the expression of the manifestation of will of the law maker, consecrated in the norms of law; 2) are always explicitly expressed by the juridical norms; 3) the work of interpretation and enacting of law is able to recognize the meanings and determinations of the law's constructed principles which, obviously, cannot exceed their conceptual limits established by the juridical norm. In this category we find principles such as: publicity of the court's hearing, the adversarial principle, law supremacy and Constitution, the principle of non-retroactivity of law, etc.

Consequently, the law's constructed principles have, by their nature, first a juridical connotation and only in subsidiary, a metaphysical one. Being the result of an elaboration inside the law, the eventual significances and metaphysical meanings are to be, after their

<sup>3</sup> Constantin Noica, *Devenirea întru ființă*, [Becoming into Being], Bucharest: Humanitas Publishing House, 1998, p. 257.

later consecration, established by the metaphysic of law, at the same time, being norms of law, have a mandatory character and produce juridical effects like any other normative regulation. It is necessary to mention that the juridical norms which consecrate such principles are superior as a juridical force in relation to the usual regulations of law, because they aim, usually, the social relations considered to be essential first in the observance of the fundamental rights and of the legitimate interests recognized to the law subjects, but also for the stability and the equitable, predictable and transparent carry on of juridical procedures.

In case of a such category of principles, the above named dialectical circle has the following look: 1) the constructed principles are normatively drafted and consecrated by the law maker; 2) their interpretation is done in the work of law's enacting; 3) the significances of values of such principles are later being expressed in the sphere of metaphysics of law; 4) the metaphysical "meanings" can establish the theoretical base necessary to broaden the connotation and denotation of the principles or normative drafting of several such newer principles.

The number of the constructed principles of law can be determined to a certain moment of the juridical reality, but there is no preconstituted limit for them. For instance, we mention the "principle of subsidiarity", a construction in the European Union law, assumed in the legislation of several European states, included in Romania.

The metaphysical principles of law can be considered as a "given" in relation to the juridical reality and by their nature, they are outside law. At their origin they have no juridical, normative, respectively jurisprudential elaboration. They are a transcendental "given" and not a transcendent of the law, consequently, are not "beyond" the sphere of law, but are something else in the juridical system. In other words, they represent the law's essence of values, without which this constructed reality cannot have an ontological dimension.

Not being constructed, but representing a transcendental, metaphysical "given" of law, it is not necessary to be expressed explicitly by the juridical norms. The metaphysical principles may have also an implicit existence, discovered or valued throughout the work for law's interpretation. As implicit "given" and at the same time as transcendental substance of law these principles must eventually meet in the end in the contents of any juridical norm and in every document or manifestation that represents, as case is, the interpretation or enacting of the juridical norm. It should be emphasized that the existence of metaphysical principles substantiates also the teleological nature of law, because every manifestation in the sphere of juridical, in order to be legitimate, must be suited to such principles.

In the juridical literature, such principles, without being called metaphysical, are identified by their generality and that's why they were called "general principles of law". We prefer to emphasize their metaphysical, value and transcendental dimension, which we consider metaphysical principles of juridical reality. As a transcendental "given" and not a constructed one of the law, the principles in question are permanent, limited, but with determinants and meanings that can be diversified within the dialectical circle that contains them.

In our view, the metaphysical principles of law are: *principle of fairness; principle of truth; principle of equity and justice; principle of proportionality; principle of liberty*. In a future study, we will explain extensively the considerations that entitle us to identify the above named principles for having a metaphysical and a transcendental value in respect to the juridical realities.

The metaphysical dimension of such principles is undeniable, yet still remains to argue the normative dimension. An elaborate analysis of this problem is outside the objective of this study, which is an extensive expose about the philosophical dimension of the principles of law. The contemporary ontology does not consider the reality by referral to classical concept, in substance or matter. In his work „*Substanzbegriff und Funktionsbegriff*”

(1910) Ernest Cassirer opposes the modern concept of function to the ancient one of substance. Not what is the “thing” or actual reality, but their way of being, their inmost make, the structure concern the modern ones. Ahead of knowledge there are no real objects, but only “relations” and “functions”. Somehow, for the scientific knowledge, but not for the ontology, the things disappear and make space for the relations and functions. Such an approach is operational cognitive for the material reality, not for the ideal reality, that ‘world of ideas’ which Platon was talking about.<sup>4</sup>

The normative dimension of juridical reality seems to correspond very well to the observation made by Ernest Cassirer. What else is the juridical reality if not a set of social relations and functions that are transposed in the new ontological dimension of “juridical relations” by applying the law norms. The principles constructed applied to a sphere of social relations by means of juridical norms transforms them into juridical relations, so these principles correspond to a reality of judicial, understood as the relational and functional structure.

There is an order of reality more profound than the relations and functions. Constantin Noica said that we have to name an “element” in this order of reality, in which the things are accomplished, which make them *be*. Between the concept of substance and the one of function or relation a new concept is being imposed, that will maintain the substantiality without being dissolved in functioning, to manifest the functionality<sup>5</sup>.

Assuming the great Romanian philosopher idea, one can assert that the metaphysical principles of law evoke not only the juridical relationships or functions, but the “valoric elements” of juridical reality, without which it would not exist.

The metaphysical principles of law have a normative value, even if not explicitly expressed by law norms. Furthermore, such as results from jurisprudence interpretations, they can even have a supernormative significance and thus, can legitimate the justnaturalist conceptions in law. These conceptions and the superjuridicality doctrine asserted by Francaise Geny, Leon Duguit and Maurice Duverger, consider that justice, the constitutional justice, in particular, must relate to rules and superconstitutional principles. In our view, such standards are expressed precisely by the metaphysical principles which we referred to. The jurisprudential conceptions were applied by some constitutional courts. It is famous on this meaning, the decision on January 16<sup>th</sup> 1957 of the Federal Constitutional Court of Germany with regard to the liberty to leave the federal territory. The Court declares: “The laws are not constitutional unless they were not enacted with the observance of the norms foreseen Their substance must be in agreement with the supreme values established by the Consitution, but they need to be in conformity with the *unwritten elementary principles* (s.n.) and with the fundamental principles of the fundamental Law, mainly with the principles of lawfull state and the social state”<sup>6</sup>.

One last thing we wish to emphasize refers to the role of the judge in applying the principles constructed especially the metaphysical principles of law. We consider that the fundamental rule is that of interpretation and implicitly of enacting any juridical regulation within the spirit and with the observance of the valoric contents of the constructed and metaphysical principles of law. Another rule refers to the situation in which there is an inconsistency between the common juridical regulations and on the other side the constructed principles and the metaphysical ones of the law. In such a situation we consider, in the light of the jurisprudence of the German constitutional court, that the metaphysical principles need to be applied with priority, even at the expense of a concrete norm. In this manner, the judge

<sup>4</sup> For more details see also, Constantin Noica, *Devenirea întru ființă, [Becoming into Being]*, Bucharest: Humanitas Publishing House, 1998, p. 332-334.

<sup>5</sup> Constantin Noica, *quoted works*, p. 327-367.

<sup>6</sup> For details see Andreescu Marius , *quoted works*, p. 34-38.



respects the character of being of the juridical system, not only the functions or juridical relations.

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